Supreme Court, U.S.
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No. 97-___

In The

Supreme Court of the United States

October Term, 1997

SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC., et al.,

Petitioners,

vs.

CABAZON BAND OF MISSION INDIANS, PETE WILSON, Governor of the State of California, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CATHY CHRISTIAN, ESQ.*
RICHARD D. MARTLAND, ESQ.
NIELSEN, MERKSAMER, PARRINELLO, MUELLER, NAYLOR, LLP
770 L Street, Suite 800
Sacramento, CA 95814
Telephone: (916) 446-6752

Attorneys for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Did the lower courts err in denying as untimely SCOTWINC and its members' motion for intervention, even though the opportunity for SCOTWINC to address the issue directly affecting its interests (that the tribal-state compact required continued state taxation of SCOTWINC for the benefit of the tribes notwithstanding the unconstitutionality of that tax) arose after remand by the Ninth Circuit?

2. Did the lower courts err in denying as untimely SCOTWINC and its members' motion for intervention given the significance of their interest in the proceedings, viz., is the redistribution to Indian tribes of taxes imposed on SCOTWINC an unlawful taking of property in violation of the Fifth and Fourteenth Amendments, notwithstanding that the redistribution to Indian tribes of taxes imposed on SCOTWINC occurs pursuant to a tribal-state compact negotiated under the Indian Gaming Regulatory Act?

LIST OF PARTIES TO THE PROCEEDING

Del Mar Thoroughbred Club
Hollywood Park, Inc.
Los Angeles Turf Club
Oak Tree Racing Association
Los Alamitos Race Course
Los Angeles County Fair
Southern California Off-Track Wagering, Inc. (SCOTWINC)
State of California
California Horse Racing Board
Cabazon Band of Mission Indians
Sycuan Band of Mission Indians
Viejas Band of Mission Indians
Barona Band of Mission Indians

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PETITION FOR WRIT OF CERTIORARI

Southern California Off-Track Wagering, Inc. (SCOTWINC), Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course, and the Los Angeles County Fair respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

CITATIONS TO OPINIONS BELOW

1. *Cabazon Band of Mission Indians, et al. v. State of California,* 788 F.Supp. 1513 (E.D. Cal. 1992) (*"Cabazon I"*)
2. *Cabazon Band of Mission Indians et al. v. Wilson,* 37 F.3d 430 (9th Cir. 1994) (*"Cabazon II"*)
3. *Cabazon Band of Mission Indians, et al. v. Wilson,* 124 F.3d 1050 (9th Cir. 1997) (*"Cabazon III"*)

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit Court of Appeals in the consolidated appeal was filed on September 2, 1997. SCOTWINC's petition for rehearing was denied and the suggestion for rehearing *en banc* rejected on January 14, 1998. This Court has jurisdiction pursuant to 25 U.S.C. § 1254.

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[1] For brevity's sake, the petitioners will collectively be referred to as "SCOTWINC" or "SCOTWINC and its members."

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 24(a)

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

A. Jurisdiction of the District Court

Two of the respondent Indian tribes filed complaints for declaratory relief in the District Court asserting that taxes on wagers placed at off-track facilities located on Indian lands were impermissible under the Indian Gaming Regulatory Act ("IGRA").[2] The tribes based jurisdiction on 28 U.S.C. sections 1331 and 1362.[3] After the issuance of *Cabazon II*, the District Court assumed jurisdiction over both the original tribes' amended complaints and the complaints of two intervening tribes which alleged breach of the State's obligations under the tribal-compact based on a construction of IGRA that implied

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[2] 25 U.S.C. sec. 2701, et seq.

[3] *Cabazon I*, p. 1514.

jurisdiction over allegations of breach because of the court's express jurisdiction over complaints of bad faith negotiations.[4] App. 37.

B. Summary of Relevant Facts and Proceedings Below

Until the issuance of the October, 1994 opinion of the Ninth Circuit Court of Appeals in *Cabazon II*, the significance of this case for Southern California Off-Track Wagering, Inc. ("SCOTWINC") – an organization created under the California Horse Racing Law consisting of racing associations, fairs, and horse owners in order to facilitate the transmission of the satellite signal of horse races to off-track locations – was limited.[5] The only

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[4] Also for brevity's sake, each of the respondent Indian tribes will collectively be referred to as "the tribes."

[5] The Horse Racing Law is found at California Business and Professions Code sections 19400, et seq. The authority to form SCOTWINC is found at section 19608.2. The Horse Racing Law permits the racing associations, racing fairs, and organizations representing horse owners to form simulcast organizations to operate the satellite wagering equipment and parimutuel system. The purpose of the organization is to permit the racing associations providing the audiovisual signal "the ability to do so without undue burden and expense, to avoid unnecessary duplication of facilities, to permit the associations to protect the security of their signals . . . [and] the integrity of their parimutuel pools and to account for wagering proceeds included in the parimutuel pools. Cal. Bus. & Prof. Code sec. 19608.2(a). The simulcast organization created by racing associations and fairs located in the "southern zone" of the State (which is defined in Cal. Bus. and Prof. Code sec. 19530.5 and in which all the Tribes who are parties to this litigation are located) is known as SCOTWINC.

question posed by the tribes in their original complaints in this matter was whether the State of California was improperly taxing *Indian tribes* on the wagers placed at off-track wagering facilities located on Indian lands, an assertion raised in the respondent tribes' original complaints. *Cabazon I*, p. 1514. The proffer of this question to the District Court was part of the several tribal-state compacts negotiated between the tribes and the State of California. *Cabazon I*, p. 1516.

The answer to that question seemed obvious to SCOTWINC, because since the advent of satellite wagering in California, only a decade ago, racing associations have paid a license fee to the State for wagers made on their horse races which were placed at off-track locations.[6] The "guest facility" – the fair or race track (or pursuant to the tribal-state compact, an Indian tribe)

California law limits off-track wagers to race tracks (who act as "guest facilities" when accepting wagers on races run at another race track) and fairs. Cal. Bus. and Prof. Code secs. 19605, 19605.1, 19605.2. The law also requires that racing associations and off-track facilities enter into a contractual agreement specifying the terms under which the audiovisual signal will be transmitted. Cal. Bus. and Prof. Code sec. 19605.3. Under the terms of the tribal-state compacts, SCOTWINC was authorized to enter into such a contractual arrangement with the respondent tribes. *Cabazon I*, p. 1515.

[6] The state license fee for wagers placed at satellite (or "off-track") wagering facilities amounts to approximately 3.5% of each wager, although the actual fee varies, depending on the horse racing event, from 1.5% to 4%. Cal. Bus. and Prof. Code secs. 19605.7 and 19605.71. The racing associations are responsible for paying these license fees to the State. Cal. Bus. and Prof. Code secs. 19605.7(i) and 19605.71(d).

which houses the facility that *receives* an audiovisual signal from a race track operating a live horse racing meet – is paid a commission of 2% of each wager placed at the satellite facility, undiminished by any state license fee or other distribution.[7] SCOTWINC provides the personnel who handle all the wagers at the guest facility (who are licensed by the California Horse Racing Board) and all funds are transmitted to the race tracks for appropriate distribution. *Any monies which are left after the appropriate distributions have been made are distributed equally between the racing associations and the horse owners; thus these funds are the property of the racing industry participants.*[8]

The legal question presented by the tribes changed, however, when the District Court considered the matter on remand after the Ninth Circuit rejected the tribes' argument of improper taxation on *the tribes*. *Cabazon II* made clear that the state license fee is not imposed on Indian tribes (or any guest facility), but rather on SCOTWINC's members.

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[7] As with all off-track wagers, those placed at the tribal facilities are combined in the parimutuel pool generated by other off-track locations and with on-track wagers. It is out of this pool that winners are paid (approximately 83% of each wager) and various distributions are made (commonly known as the "takeout"), both to the racing associations and horse owners, and to the guest facilities (such as the tribal facilities), the State, and various other designated entities. Cal. Bus. and Prof. Code secs. 19605.7, 19605.71, 19610.

[8] Cal. Bus. and Prof. Code sec. 19605.8.

The District Court permitted the tribes to amend their complaints and allege that the State was in breach of the tribal-state compact. Notwithstanding that the Ninth Circuit held the license fee to be invalid under IGRA, the tribes' amended complaints asserted the terms of the tribal-state compacts required the State to continue to collect the fee from SCOTWINC's members and pay over the invalid license fees to the tribes. The District Court, albeit with reluctance, granted judgment to the tribes and ruled that SCOTWINC's motion for intervention as of right was untimely. App. 36, 54, 56. The District Court's order was subsequently affirmed in *Cabazon III*.

REASONS FOR ISSUING WRIT

The Writ Should Issue Because SCOTWINC and its Members Should Have Been Permitted to Intervene As of Right in Order to Challenge A Construction of the Tribal-State Compact Requiring that License Fees Collected from Racing Associations and Horse Owners Must be Paid to Respondent Indian Tribes.

This Court has long recognized that the refusal of the lower courts to permit one to intervene as a party entitles the proposed intervenor to seek a writ of certiorari to review the denial of intervention. (See, *United Auto Workers v. Scofield*, 382 U.S. 205, 209 (1965); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corporation*, 510 U.S. 27, 29 (1993).) Under the criteria set forth in Rule 24 of the Federal Rules of Civil Procedure, petitioners SCOTWINC and its members should have been permitted to intervene as of right.

The lower courts did not dispute SCOTWINC's claim of its right to intervene, but rather denied SCOTWINC's motion for intervention as of right solely on the ground that it was untimely. *Cabazon III*, pp. 1060-1062. As explained herein, the point at which SCOTWINC attempted to intervene was not unreasonable given the posture of the case. In any event, given the lack of prejudice to the parties, the magnitude of SCOTWINC's interest, and the changed circumstances of the litigation after remand, SCOTWINC and its members should have been permitted to intervene.

As the Ninth Circuit noted, applications for intervention as of right must be interpreted broadly in favor of intervention. *Cabazon III*, p. 1061. Moreover, timeliness must be determined by reviewing "(1) the stage of the proceedings; (2) whether the parties would be prejudiced; and (3) the reason for any delay in moving to intervene." *Ibid.* Of these three factors, the Ninth Circuit focused exclusively on determining when SCOTWINC's claimed interest was implicated and, in so doing, misstated the development of this case.

As noted earlier, the only issue before the District Court in the initial proceeding was whether the deduction of state license fees from the revenue generated at the tribes' facilities was an impermissible tax on the tribes. Indeed, the tribes' complaints ask only for a declaratory judgment finding that the tax is impermissible because it is imposed *on the tribes*. *Cabazon I*, p. 1514. The District Court rejected this contention and held that the fee was not an impermissible tax, stating:

> "State law places the duty to pay the license fee on the *racing associations*. Bus. & Prof. Code §§ 19605.7(i) & 19605.71(d). If California cannot tax the revenue derived from betting at simulcast facilities located on the Tribes' lands, these revenues would be distributed 50% to the racing associations and 50% as purses to horsemen who participate in the races. Cal. Bus. & Prof. Code §§ 10605.8 & 19606. Because the Tribes do not have the responsibility of paying the taxes, and have no right to the revenues if the taxes were to go unpaid, the license fees do not impose an economic burden on the Tribes."

Cabazon I, p. 1517, emphasis added.

At this point, the racing associations had no legal interest that would have justified intervention in a proceeding in which the only issue was the taxing power of the State over the tribes. *Cabazon II*, however, reversed the District Court and held that:

> "As the [District C]ourt explained, 'because the Tribes do not have the responsibility of paying the taxes, and have no right to the revenues if the taxes were to go unpaid, the license fees do not impose an economic burden on the Tribes.' *Cabazon Band*, 788 F. Supp at 1518. State law does not govern this case, however. Rather, the terms of the compact control. . . . Under the Cabazon and Sycuan Compacts, if the Bands prevail in this litigation, the State is required to pay them the amount of the license fee that the

> State receives from the racing associations based on wagers at Indian facilities."

Cabazon II, pp. 433-434.

Thus, the Ninth Circuit ultimately acknowledged that the racing associations, not the tribes, pay the state license fee. The tribes' argument to the lower courts, however, never wavered from the assertion that the State was unlawfully taxing them, which explains SCOTWINC's decision not to attempt intervention in the dispute between the tribes and the State. Although the effect of the tribal-state compact upon the parties should the state license fee be declared impermissible was not before the court, the Ninth Circuit nonetheless concluded that the tribal-state compacts require the State to transfer to the tribes fees paid by the racing associations, notwithstanding the associations' rights to all revenues not required to be distributed pursuant to California Business and Profession Code section 19605.8. While it is arguable that SCOTWINC's interests were implicated at this point, it is not likely that intervention would have been granted because the cause was concluded.

On remand, the case took on a second life. The District Court acknowledged in its order of July 12, 1995, that the "litigation has now entered a new and confusing stage." The District Court was referring to the fact that the State was refusing to transfer the simulcast fees to the Cabazon and Sycuan tribes on the ground, among others, that (1) the Ninth Circuit's determination that federal law preempted the state license fee, and its finding that the settlement provisions of the compacts established a tribal "right" to the tax revenues, imparted a meaning to the

compacts that the State never intended and to which the State never agreed (thereby invalidating the compacts); and (2) the Cabazon and Sycuan tribes themselves breached their compacts with the State by operating illegal slot machines. Indeed, the State challenged the very jurisdiction of the District Court to hear the tribes' claim to entitlement of the state license fee, an argument rejected by that court. App. 37.

Although determining that it had jurisdiction, the District Court held that the tribes were required to amend their complaints if they sought an order that the State pay the tax revenues to the tribes. In its response, the State asserted five affirmative defenses and three counterclaims. One of the State's affirmative defenses was the tribes' failure to join the racing associations as indispensable parties. App. 36-37.

The pleading of this defense is the first time the statutory rights of SCOTWINC and its members to the invalid state license fee became a triable issue in this litigation. Motions to strike all of the State's affirmative defenses were filed by the tribes and granted by the District Court. The State filed a motion for reconsideration but did not seek reconsideration of the District Court's ruling striking the indispensable party defense. Before the District Court's scheduled hearing date concerning the motion for reconsideration, SCOTWINC moved to intervene.

On these facts, SCOTWINC contends that the District Court and the Ninth Circuit erred in holding that the racing associations could not intervene because they had been "aware" of this litigation for many years. The test

for timeliness in an intervention motion is when the applicant becomes aware that its interest would no longer be protected adequately by the parties, not the date when the applicant first became aware of the litigation. *Legal Aid Society of Alameda v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977). Contrary to the lower courts' statements, while this litigation may have been pending for "years," SCOTWINC's interest did not become a triable issue in this litigation until the District Court permitted the tribes to amend their complaints to seek affirmative relief and the State asserted and was denied its indispensable party defense.

Although SCOTWINC's intervention motion was not filed until after the District Court entered its order on remand in favor of the tribes, the time was reasonable given the circumstances outlined above. No finding was made that any party was prejudiced. Moreover, the tribes' amendment of their complaints created a new cause of action. When the issues raised in the course of litigation change, courts considering an intervention request must judge the timeliness issue in the context of the changed circumstances presented.

In *United States v. Oregon*, 745 F.2d 550 (9th Cir. 1984), the State of Idaho sought to intervene in an action initially filed by the United States and the Warm Springs Indian Tribes against the State of Oregon. The parties earlier agreed to a five-year plan managing fisheries on the Columbia River. Upon expiration of the plan, the tribes served notice of their intent to withdraw, and, one week prior to the District Court's order requiring the parties to attempt to agree on a modified plan, the State

of Idaho sought intervention. Idaho argued that "changed circumstances" – the possibility of new and expanded negotiations – justified intervention late in the litigation. In reversing the District Court's denial of the motion, the Ninth Circuit noted that "mere lapse of time alone is not determinative." *Id.* at 552. Holding that the litigation was entering a new stage, Idaho was permitted to intervene. The *Oregon* decision also relied on *Januszewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 293 (3rd Cir. 1982) ("intervention should have been granted where applicant sought to participate in a new phase of litigation"). See also *Pellegrino v. Nesbit*, 203 F.2d 464, 465 (9th Cir. 1953) (court should consider not only period of time that has passed but also circumstances contributing to the delay).

In the context of post-judgment motions to intervene, this Court has held that a motion filed promptly after the entry of judgment is timely. See, *NAACP v. New York*, 413 U.S. 345, 366.

In addition intervention should be allowed, even after a final judgment, where it is necessary to preserve some right which cannot otherwise be protected. See, *Pellegrino v. Nesbit*, 203 F.2d 464, 465, *supra; Cuthill v. Ortman-Miller Mach. Co.*, 216 F.2d 336, 338 (7th Cir. 1954). In this case, the basis of SCOTWINC's motion in the District Court was that the construction of the compacts urged by the tribes and adopted by that Court amounts to an unconstitutional taking of their property. Obviously, the State of California does not believe its actions in negotiating compacts with the tribes were unconstitutional. The State has repeatedly asserted that it disagrees

lower courts. However, with all due respect to the State and the State's actual intentions, as a practical matter the issue of a constitutional taking can more effectively be advanced by the owner of the property interest taken than by the party who may have inadvertently caused the taking.

The Ninth Circuit has held that the test for whether a proposed intervenor is "adequately" represented is "(1) Are the interests of a present party in the suit sufficiently similar to that of the absentee such that the legal arguments of the latter will undoubtedly be made by the former; (2) is that present party capable and willing to make such arguments; and (3) if permitted to intervene, would the intervenor add some necessary element to the proceedings which would not be covered by the parties in the suit?" *Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir. 1977); see also, *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980).

Although the State raised SCOTWINC's statutory rights by way of a rejected affirmative defense, the State did not raise the issue again in its motion for reconsideration or in its appeal to the Ninth Circuit. If SCOTWINC's rights are not addressed in this proceeding, they will have to be addressed in a state proceeding in which the State is the only party.[9] If SCOTWINC prevails, the State

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[9] Both the District Court and the Ninth Circuit suggested that SCOTWINC and its members "will be free to pursue any grievance they may have against the State in a separate action if they so choose." *Cabazon III*, p. 1061, n.3. However, as was pointed out in the briefs filed to the lower courts, the State may assert 11th Amendment immunity to any claim for money

will be liable for monies it has paid the tribes. Given this potential liability, it cannot be assumed that in the absence of SCOTWINC, the State will vigorously advance arguments which might benefit SCOTWINC and its members in a separate state proceeding.

Thus, SCOTWINC and its members should have been permitted to intervene as of right in this litigation.

CONCLUSION

For each of the reasons stated herein, this Court is respectfully requested to grant the petition for certiorari.

Respectfully Submitted,

NIELSEN, MERKSAMER,
PARRINELLO, MUELLER &
NAYLOR, LLP

CATHY CHRISTIAN*
Attorneys for Petitioners

* *Counsel of Record*

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damages filed in federal court and any claim asserted in state court might be subject to the vicissitudes of legislative appropriation. See, e.g., *Calif. State Employees Assn. v. Flournoy*, 32 Cal.App.3d 219 (1973).